FILED
AUG 16 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-190

IN THE

Supreme Court of the United States

October Term, 1985

KELVIN DENNIE, Individually and on Behalf of his Minor Son NKOSI,

Petitioners,

vs.

UNIVERSITY OF PITTSBURGH SCHOOL OF MEDICINE and PRESBYTERIAN UNIVERSITY HOSPITAL and NIEL WALD, M.D. and JOHN DOE,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Counsel of Record:

WILBUR McCOY OTTO, ESQ.
INGRID M. LUNDBERG, ESQ.
DICKIE, McCAMEY & CHILCOTE, P.C.
Two PPG Place, Suite 400
Pittsburgh, Pennsylvania 15222-5402
(412) 281-7272

For Respondents, University of Pittsburgh School of Medicine, Presbyterian University Hospital and Niel Wald, M.D.

Batavia Times Publishing Co.
Harold L. Berkoben
Pittsburgh, Pa. (412) 881-7463

BEST AVAILABLE COPY

Question Presented for Review

Was the suit against the non-resident defendant doctor, hospital, and university properly dismissed for lack of *in personam* jurisdiction?

TABLE OF CONTENTS.

	Page
Question Presented for Review	i
Table of Authorities	ii
Parties to the Proceeding	2, f.n. #1
Jurisdictional Grounds	2
Addition to Statement of the Case	2
Summary of the Argument	4
Argument for Denying Writ of Certiorari	5
I. Defendant doctor under Privacy Act claim	5
II. Defendant hospital and university under the Privacy Act claim	6
III. Defendant doctor, university and hospital under second question raised by petitioner	7
Conclusion	8
Certificate of Service	9
Affidavit of Mailing	10
Appendix of Statutes	1a

TABLE OF AUTHORITIES.

CASES.

Bruce v. United States, 621 F.2d 914 (8th Cir. 1980)	5
Forsham v. Harris, 445 U.S. 169 (1980)	6
Irwin Memorial Blood Bank v. American National Red Cross, 640 F.2d 1051 (9th Cir. 1981)	6
Windsor v. The Tennessan, 719 F.2d 155 (6th Cir. 1983)	5

Page

STATUTES.

Courts of Appeal; Certiorari, 28 U.S.C.A. §1254 2
Jurisdiction; Federal Question, 28 U.S.C.A. §1331.....7, f.n. #2
Mandamus and Venue Act of 1962, 28 U.S.C.A. §1391(e) 7
Supreme Court; Time for Certiorari, 28 U.S.C.A. §2101 2
Privacy Act 5 U.S.C.A. §552(a)..... 5,7
Virgin Islands Long Arm Statute 5 V.I.C. §4903 ... 7

RULES OF COURT.

Sup. Ct. R. 11.2 2
Sup. Ct. R. 20.2 2
Sup. Ct. R. 21.5 7
Sup. Ct. R. 34.1(b).....2, f.n. #1

IN THE

Supreme Court of the United States

October Term, 1985

No. 85-190

KELVIN DENNIE, Individually and on Behalf of his Minor Son NKOSI,

Petitioners,

vs.

UNIVERSITY OF PITTSBURGH SCHOOL OF MEDICINE and PRESBYTERIAN UNIVERSITY HOSPITAL and NIEL WALD, M.D. and JOHN DOE,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The respondents, University of Pittsburgh, Presbyterian University Hospital and Niel Wald, M.D. respectfully request that this Court deny the petition for writ of certiorari, seeking review of the United States Court of Appeals for the Third Circuit which affirmed the opinion reported at 589 F.Supp. 348. There are no special and important reasons for the exercise of discretionary review in this matter.

Jurisdictional Grounds

In this civil case, Dennie filed an August 1 and a July 8, 1985 petition for a writ of certiorari. Both were made within 90 days of the entry of the May 3, 1985 judgment and the June 7, 1985 denial of Dennie's petition for rehearing *en banc.* (28 U.S.C.A. §2101(c); Sup.Ct. R. 11.2, 20.2.)

Section 1254 of 28 U.S.C.A. confers on this Court jurisdiction to review the judgment by writ of certiorari.

Addition to Statement of the Case

The source of Mr. Dennie's ("Dennie") present claim against this defendant doctor, hospital and university[1] is a 1977 civil action against Hess Oil Virgin Island Corporation ("Hess Oil"). During discovery for that 1977 case, counsel for Hess Oil arranged with counsel for Dennie to have Dennie and his son tested in Pittsburgh, Pennsylvania concerning Dennie's alleged radiation injuries. Following brief testing, this defendant doctor communicated by letter to counsel for Hess Oil concerning his review of the tests performed on Dennie and his son.

Following settlement of that Hess Oil suit, Dennie has continued to proceed through the Courts, with and without counsel, in an attempt to subject these defendants to suit in the Virgin Islands. The first action

---

[1] Pursuant to Rule 28 of this Court, reference is made to the August 7, 1984 "Disclosure of Corporate Affiliations and Financial Interest" filed at No. 84-3455 in the United States Court of Appeals for the Third Circuit. There have been no changes. Pursuant to Rule 34.1(b) of this Court, it is further stated that all named parties to the petition were and remained a party for purposes of this petition.

was terminated in a joint stipulation of dismissal without prejudice to Dennie filing in a court of competent jurisdiction. (Civil No. 82/52: D.V.I. Division of St. Croix). The next two *pro se* complaints were dismissed *sua sponte* for lack of personal jurisdiction. (Civil Nos. 82/251 and 83/227: D.V.I. Division of St. Croix.)

On June 8, 1984, after briefing and oral arguments, the District Court issued a well-reasoned opinion on Dennie's fourth attempted suit concerning that medical letter in the Hess Oil suit. The District Court considered each of the issues raised by Dennie and properly concluded that the facts did not support *in personam* jurisdiction in the Virgin Islands. None of the defendants were federal agencies, nor did the conduct of any of the non-resident defendants fall within any of the subsections of the Long Arm Statute of the Virgin Islands. On July 12, 1984, Dennie's motion for reconsideration was also denied.

On May 3, 1985, after briefing and oral argument where both counsel for Dennie and Dennie himself addressed the panel, the United States Court of Appeals for the Third Circuit affirmed the District Court without opinion. On June 7, 1985, Dennie's petition for rehearing *en banc* was denied and this petition for writ of certiorari followed on July 8, 1985. A corrected petition was received August 5, 1985.

Summary of the Argument

Under the facts of this case, The Privacy Act providing nationwide personal jurisdiction over United States government agencies in a civil action does not provide a basis of *in personam* jurisdiction over these defendants who are not federal agencies.

ARGUMENT FOR DENYING WRIT OF CERTIORARI

I. Defendant doctor under Privacy Act claim.

As relied upon by Dennie, Title 5, §552a is a codification of Section 3 of the Privacy Act of 1974 which was designed to safeguard the rights of personal privacy against invasion by federal agencies that collect and use personal data. Section 552a(g) of the Privacy Act provides that a civil damage action may be brought solely against an "agency" for violations of the Act. An individual is not encompassed in the term "agency". *Windsor v. The Tennessan*, 719 F.2d 155 (6th Cir. 1983), *reh. denied* (1984); *Bruce v. United States*, 621 F.2d 914, 916 n. 2 (8th Cir. 1980). Even if for purposes of this argument only, one would assume that the doctor was a government employee or official, the Act does not subject an individual to civil remedies provided by the Privacy Act. (Appendix, p. 46: 589 F.Supp. at 352). The defendant doctor is not a proper subject to an action under the Privacy Act.

II. Defendant hospital and university under the Privacy Act claim.

Under the facts presented to the District Court and as reviewed by the appellate court, no facts were alleged by Dennie which would have made either the hospital or the university a federal agency. (Appendix, p. 46; 589 F.Supp. at 352).

The allegations by Dennie that the university and/or hospital may have received federal research grants is insufficient to establish an entity as a federal agency for purposes of the Privacy Act. Following this Court's holding in *Forsham v. Harris*, 445 U.S. 169, 180-81 (1980), the District Court reviewed the facts and found that Dennie had not made a threshold showing of substantial federal control or supervision. (Appendix 46; 589 F.Supp. at 352). In accord, *Irwin Memorial Blood Bank v. American National Red Cross*, 640 F.2d 1051, 1054-55 (9th Cir. 1981). Neither the hospital nor the university are federal agencies subject to nationwide personal jurisdiction under the Privacy Act.

III. Defendant doctor, university and hospital under second question raised by petitioner.

It is not clear what additional issue, if any, is raised by Dennie in his second question presented for review. Under the Supreme Court Rule 21.5, "[t]he failure of petitioner to present with accuracy, brevity, and clearness whatever is essential to a ready and adequate understanding of the points requiring consideration will be a sufficient reason for denying this petition". In addition to the substantive reasons for denying this petition, procedurally, this petition should be dismissed under Rule 21.5.

Dennie claims a deprivation of a right under federal statute 5 U.S.C.A. 522a(g)(5). (Petition for Certiorari; p. 8, ¶4). Dennie's petition appears to abandon his prior arguments based upon the Virgin Islands Long Arm Statute and/or the Mandamus and Venue Act of 1962, 28 U.S.C. §1391(e). To the extent the *pro se* petition arguably has not abandoned those claims, respondents assert that the District Court properly followed the precedent set forth by this Court and the circuit courts in determining that personal jurisdiction over the doctor, Hospital and University should not be asserted under either of those statutes. (Appendix, pp. 47-49; 589 F.Supp. at 353-355).

The remaining statutes[2] cited by Dennie cloud the issue and misapply the basic principles of personal jurisdiction. There are no special and important reasons for a review of this matter.

---

[2] Dennie's citation of the 28 U.S.C.A. §1331 was prior to amendment concerning the amount in controversy. A sum in excess of $10,000 is no longer required for federal question. "[T]he district courts shall have original jurisdiction of all civil actions arising under the constitution, laws, or treaties of the United States."

Conclusion

The decision of the District Court concerning personal jurisdiction and liability under the Privacy Act follows all relevant precedent and there is no authority to the contrary. For all the foregoing reasons, review by this Court should be denied.

Respectfully submitted,

DICKIE, McCAMEY & CHILCOTE, P.C.
WILBUR McCOY OTTO
INGRID M. LUNDBERG
Counsel for Respondents,
University of Pittsburgh School of Medicine, Presbyterian University Hospital and Niel Wald, M.D.

Certificate of Service

I hereby certify that I have deposited three copies of the foregoing "Brief in Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit" by first-class, postage pre-paid United States mail to:

I further certify that no other parties are required to be served.

Kelvin Dennie
Appellant (Petitioner) *Pro Se*
P.O. Box 7169
Sunny Isle, Christiansted
St. Croix, USVI 00820

Date: August 15, 1985.

WILBUR McCOY OTTO
Wilbur McCoy Otto
INGRID M. LUNDBERG
DICKIE, McCAMEY & CHILCOTE, P.C.
Two PPG Place, Suite 400
Pittsburgh, Pennsylvania 15222-5402
(412) 281-7272
Counsel for Respondents,
University of Pittsburgh School of Medicine and Presbyterian University Hospital and Niel Wald, M.D.

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1985

No. 85-190

KELVIN DENNIE Individually and on Behalf of His Minor Son NKOSI,

Petitioner,

vs.

UNIVERSITY OF PITTSBURGH SCHOOL OF MEDICINE and PRESBYTERIAN UNIVERSITY HOSPITAL and NIEL WALD, M.D. and JOHN DOE,

Respondents.

Affidavit

Having been first duly sworn, the undersigned deposes and says:

1. My name is Wilbur McCoy Otto. I am a member of the Bar of the Supreme Court of the United States.

2. I make this Affidavit pursuant to Supreme Court Rule 20.2.

3. On the 15th day of August, 1985, respondent's brief in opposition to the petition for writ of certiorari in the above-captioned case was deposited in the United States post office with first-class postage prepaid and properly addressed to the Clerk of the Court for the Supreme Court of the United States.

4. To the best of my knowledge, information and belief, the mailing took place as described and was within the time permitted for filing.

Further, affiant sayeth not.

WILBUR McCOY OTTO
Wilbur McCoy Otto
DICKIE, McCAMEY & CHILCOTE, P.C.
Two PPG Place, Suite 400
Pittsburgh, Pennsylvania 15222-5402
(412) 281-7272

SWORN AND SUBSCRIBED before me this 15th day of August, 1985.

ELAINE AMBROSE
Elaine Ambrose
Notary Public
Pittsburgh, Allegheny Co., PA.
My commission expires Jan. 30, 1988

APPENDIX A

Federal Privacy Act

5 U.S.C.A. RECORDS MAINTAINED ON INDIVIDUALS

552a(g)(1)—Civil Remedies—Whenever any agency

(A) Makes a determination under subsection (d)(3) of this section not to amend an individual's record in accordance with his request, or fails to make such review in conformity with that subsection;

(B) Refuses to comply with an individual request under subsection (d)(1) of this section;

(C) Fails to maintain any record concerning any individual with such accuracy, relevance, timeliness, and completeness as is necessary to assure fairness in any determination relating to the qualifications, character, rights, or opportunities of, or benefits to the individual that may be made on the basis of such record, and consequently a determination is made which is adverse to the individual; or

(D) Fails to comply with any other provision of this section, or any rule promulgated thereunder, in such a way as to have an adverse effect on an individual,

the individual may bring a civil action against the agency, and the district courts of the United States shall have jurisdiction in the matters under the provisions of this subsection.

552a(g)(5)—Venue

An action to enforce any liability created under this section may be brought in the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, without regard to the amount in controversy, within two years from the date on which the cause of action arises, except that where an agency has materially and willfully misrepresented any information under this section to be disclosed to an individual and the information so misrepresented is material to establishment of the liability of the agency to the individual under this section the action may be brought at any time within two years after discovery by the individual of the misrepresentation. Nothing in this section shall be construed to authorize any civil action by reason of any injury sustained as the result of a disclosure of a record prior to September 27, 1975.